In the
Supreme Court of the United States

OCTOBER TERM, 1978

NO. **78-1263**

EAST CARROLL PARISH POLICE JURY
and EAST CARROLL PARISH SCHOOL
BOARD, et al.,
Petitioners

versus

STEWART MARSHALL,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit rendered on October 25, 1978.

OPINIONS BELOW

The unpublished decision of the U.S. Court of Appeals for the Fifth Circuit, rendered on October 25, 1978, is attached hereto as Appendix A.

The appellate judgment reversed a decision of the U.S. District Court for the Western District of Louisiana, rendered on June 3, 1976, which is attached hereto as Appendix C.

JURISDICTION

The decision of the Fifth Circuit Court of Appeals was

rendered on October 25, 1978. Defendants' Petition for rehearing was denied by Order dated December 21, 1978, which is attached as Exhibit D.

The jurisdiction of this Court is invoked under Rule 19.1 (b) of the rules of the Supreme Court of the United States and 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

a) Is the plan before the Court a legislative or court ordered plan of reapportionment?

b) If a Legislative plan of reapportionment, is it not constitutionally permissible for public bodies to take race into account in drawing districts?

c) If a Court ordered plan of reapportionment, which is denied, would not equitable standards permit a District Court to approve a plan based in part on racially proportional representation?

d) Should Attorney's fees in this case be denied, or, alternately, is the award of Attorney's fees in the amount of $21,640.00 excessive and unreasonable, and should it be reduced?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section One of the Fourteenth Amendment to the United States Constitution provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (U.S.C. Const. Amend. 14; Sec. 1)

Section One of the Fifteenth Amendment to the United States Constitution provides:

> "Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." (U.S.C. Const. Amend. 15, Sec. 1)

42 U.S.C. Sec. 1973(e), provides as follows:

> "In any action or proceeding to enforce the voting guarantees of the Fourteenth and Fifteenth Amendments, the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

On July 12, 1968, Charles Zimmer sued various officials

of Louisiana and East Carroll Parish, alleging that the apportionment of the Police Jury (governing body of the Parish/County) and the school board violated the U.S. Constitution. The District Court adopted a parish at-large election plan. On may 11, 1971, Stewart Marshall intervened on behalf of himself and all black voters in the Parish, arguing that the at-large system approved as a remedy to Zimmer's complaint violated the rights of the black residents of the Parish. A panel of the Fifth Circuit Court of Appeals affirmed. *Zimmer vs. McKeithen,* 467 F.2d 1381 (1972). The Appellate Court en banc reversed and remanded on Constitutional grounds. *Zimmer vs McKeithen,* 485 F.2D 1297 (1973). The U.S. Supreme Court affirmed, but on the alternative ground that the District Court abused its discretion in approving multi-member districts, absent exceptional circumstances. *East Carroll School Board vs. Marshall,* 96 S.Ct. 1083 (1976).

On remand, the District Court adopted defendants' plan in preference to plaintiff's plan. Each plan provided single-member districts, and the districts in each plan were apparently drawn so as to ensure the election of blacks from certain districts and whites from other districts. The Court approved plan of defendants' would guarantee blacks four seats, and give them a good chance to capture a fifth. Plaintiff's proposed plan would probably produce five black and four white representatives.

East Carroll Parish is a small, poor, rural parish in the northeast corner of Louisiana. In 1970, its population was 12,884, with 55% of the registered voters white. A special census was taken in 1976, to provide information for this suit, which indicated that 60% of the parish population was black, but whites still constituted a slight majority of the

registered voters, comprising 51.8 percent of the total.

The defendants' plan approved by the District Court yielded districts with the following racial population compositions:

District 1:	55% white	45% black
District 2:	78% white	22% black
District 3:	49% white	51% black
District 4:	72% white	28% black
District 5:	55% white	45% black
District 6:	14% white	86% black
District 7:	1% white	99% black
District 8:	36% white	64% black
District 9:	7% white	93% black

(Tr. 29-31)

Earl K. Selle, an expert employed by defendants, testified on behalf of defendants' plan. He stated that the 1976 census revealed 40% white population, and 60% black, and 51.8 white registered voters and 48.2% black. (Tr. 34 & 35) He stated that his plan would provide very closely for the same percentage of black representation on the boards, as the percentage of black registered voters in the parish. 48.2% of the registered voters were black, 48.2% of a nine member board is 4.3, and his plan provided for 4.4 of the 9 member board to be black. (Tr. 34, 35, 52).

Mr. Selle stated that in drawing up his plan he took into account and considered population deviation balances and racial considerations; that he tried to make the districts as concise as possible, and to utilize old ward lines, major highways, natural boundaries, and streets in the Town of Lake Providence. (Tr. 19, 38 & 55). Defendants' plan had a maxi-

mum population deviation of 6.2%, while plaintiff's plan had a maximum deviation of 9.7%.

He stated that certain jagged district lines were drawn to achieve population deviation balance, and to comply with a "fairness" standard of proportional racial representation. (Tr. 55 & 56).

ARGUMENT

A writ of certiorari should be granted in this case, to review the decision of the Fifth Circuit Court of Appeals, on the following grounds:

A. If the plan before the the Court is a legislative plan of reapportionment, the decision by the Court of Appeals is contrary to a decision previously rendered by this Court in the case of *United Jewish Organization etc. vs. Carey, et al.*, 97 S.Ct. 996 (1977).

B. Alternatively, if the plan before this Court is a Court ordered plan of reapportionment, the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, to-wit: May a Court ordered plan of reapportionment, guided by Constitutional and equitable standards, be based in part on racially proportional representation?

1. ***Is the plan before the Court a legislative or Court ordered plan of reapportionment?***

The Fifth Circuit held in its recent decision that the plan was a Court ordered plan, to be judged by equitable standards, rather than a legislative plan to be judged by constitutional standards.

In this case, the Police Jury and School Board passed resolutions adopting the plan in question. Notices were given, meetings were called, and the two public bodies voted to adopt the plan. They were legislative acts, the two bodies exercised a legislative judgment, reflecting the policy choices of the elected representatives of the people. See *Wise vs Lipscomb*, 98 S.Ct. 2493 (1978).

The Fifth Circuit panel held the plan to be Court ordered because defendants' Counsel, in Court, and concerned about a possible voting rights violations, used the term "submitted" as distinguished from "adopted" when referring to the plan. (Marshall vs. Edwards, _____ F.2d 410, 416, 1978).

I submit that Counsel's statement could not change the basic facts. If it had been legislatively adopted - and it had - whatever statement he might make could not change that fact.

The question before the Court was not whether it could have done a better job of apportionment, but whether the plan was constitutional. It was not the Court's function to substitute its views for those of the boards, if the boards have exercised a legitimate and constitutional legislative judgment. *Kelly vs. Bumpers*, 340 F. Supp. 568, aff'd, 93 S. Ct. 3047 (1972).

2. *If this is in fact a legislative plan of reapportionment, is it not constitutionally permissible for the public bodies to take race into account in drawing districts?*

YES. In *United Jewish Organizations, etc. Vs. Carey*, 97 S. Ct. 996 (1977), the Supreme Court held that the constitution permits states to draw lines deliberately in such a way that the percentage of districts with a nonwhite majority roughly approximates the percentage of nonwhites in the County.

> "Contrary to petitioner's first argument, neither the Fourteenth nor the Fifteenth Amendments mandates any per se rule against using racial factors in districting and apportionment." P. 1007.

If this is a legislative plan of reapportionment, then the Fifth Circuit's decision should be overruled as not being in conformity with the *United Jewish Organizations* case, and for this reason, a writ of certiorari should be granted.

3. *Even if this is a Court ordered plan of reapportionment, which is denied, would not equitable standards permit a District Court to approve a plan based on racially proportional representation?*

This is apparently a question of first impression, raised and skirted in *Taylor vs. McKeithen*, 499 F. 2d 893 (1974), but presented squarely here, and certainly should merit consideration by the United States Supreme Court.

Mr. Selle took race into consideration in drawing his plans, and candidly said so in Court. Is this necessarily bad?

The Fifth Circuit stated in its recent decision:

> "The defendants' plan adopted a straightforward approach to fairness in representation: major groups share representation in the proportions that they share voting strength." (*Marshall vs. Edwards*, ___ F.2d 410, 418 (1978)).

Mr. Selle considered all the proper factors: concise districts, population balance, racial considerations, he utilized old ward lines, major highways, natural boundaries and streets in the Town of Lake Providence.

A few districts had jagged lines, but this was done to provide population balance and proportionate racial representation.

The U.S. Supreme Court, in the *United Jewish Organizations* case said it was constitutionally permissible. And the U.S. Supreme Court, in its per curiam opinion in *Taylor vs. McKeithen*, indicated that it might be permissible for Federal Judges to take racial consideration into account when redistricting, and this might not amount to unconstitutional gerrymandering, and this issue "would present an important federal question of the extent to which the broad equitable powers of a federal court . . . are limited by the colorblind concepts of Gomillion vs. Lightfoot... and Wright vs. Rockefeller...". (Taylor vs. McKeithen, 499 F.2d 893, 895, (1974).

We have this issue squarely presented here, certainly it is "an important federal question", one that should be decided and determined by the u.S. Supreme Court.

4. *Is not the award of Attorney's fees in the amount of $21,640.00 excessive and unreasonable?*

The award of attorney's fees in the amount of $21,640.00 is grossly excessive, arbitrary and unreasonable, bears no relationship to work performed or ability of the defendants to pay, and amounts to a back-breaking fine or penalty imposed on public bodies in a poor, rural parish, which simply do not have the funds to pay such an amount.

If the decision is reversed, petitioner's attorney would not represent the "prevailing party", as described in 42 U.S.C. Sec. 1973(e), and would not be entitled to compensation.

Even if petitioner prevails, the amount awarded is not "reasonable", is an abuse of the Trial Judge's discretion, and should be reduced.

CONCLUSION

Writs of certiorari should be granted in this Case for the following reasons:

1. If the plan in the instant case is a legislative plan of reapportionment, then the Fifth Circuit's decision is not in conformity with the U.S. Supreme Court's decision in *United Jewish Organization, etc., vs. Carey*, which held that race could be a factor in redistricting.

2. If the plan in the instant case is a court ordered plan of reapportionment, then the question of whether or not proportionate racial representation is a permissible goal of reapportionment is an important federal question, perhaps one of first impression, and should be determined by the U. S. Supreme Court.

3. The imposition of Attorney's fees in the amount of $21,640.00 is excessive, unreasonable, arbitrary, and totally out of line with work performed or the ability of defendants to pay, and should be either denied or reduced.

WHEREFORE, defendants pray that a writ of certiorari be granted in this case, that the decision of the Court of Appeals be reversed, the decision of the District Court upheld, and the award of attorney's fees denied or reduced.

Respectfully Submitted:

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Attorney for Petitioners

PROOF OF SERVICE

I hereby certify that all parties required to be served with copies of the foregoing petition have been served, and in particular, that three copies of the foregoing petition for writ of certiorari have been served upon petitioner in the above captioned case by mailing copies of same to his Attorney of record, Stanley A. Halpin, Jr., at his address at 806 Perdido Street, Suite 401, New Orleans, Louisiana 70112, with sufficient postage affixed, this day of February , 1979.

George F. Fox, Jr.
Attorney ~~for Respondents~~

APPENDIX A

Opinion of United States Court of Appeals,
Fifth Circuit

Stewart MARSHALL, Plaintiff-Intervenor-Appellant
Appellee,

v.

Edwin W. EDWARDS et al.,
Defendants-Appellees,

East Carroll Parish Policy Jury and East Carroll Parish School Board, Defendants-Appellees-Appellants.

No. 76-3114.

United States Court of Appeals,
Fifth Circuit.

Oct. 25, 1978

Appeals were taken from orders of the United States District Court for the Western District of Louisiana, Benjamin C. Dawkins, Jr., J., approving a reapportionment plan for a parish police jury and school board and awarding the complainant's counsel $21,640 as attorneys' fees. The Court of Appeals, Wisdom, Circuit Judge, held that: (1) equitable standards did not permit the district court to approve a plan based on racially proportional representation, and (2) the attorneys' fee award was not an abuse of discretion.

Reversed and remanded.

1. Elections 12

Equitable standards did not permit district court to approve reapportionment plan based on racially proportional representation. U.S.C.A. Const. Amends, 14, 15.

2. Elections 12

Legislature may take race into account in districting. U.S.C.A. Const. Amends. 14, 15.

3. Counties 38

Voting age population is important factor to be considered in assessing constitutionality of reapportionment plan. U.S.C.A. Const. Amend. 14.

4. Federal Civil Procedure 2737.6

In reapportionment case, attorneys' fee award of $21,640 to complainant's counsel was not abuse of discretion in light of nonroutine nature of litigation, which had occupied district court for several years.

Appeals from the United States District Court for the Western District of Louisiana.

Before WISDOM, GOLDBERG and RUBIN, Circuit Judges.

WISDOM, Circuit Judge:

This reapportionment case is again before us. On July 12, 1968, Charles Zimmer sued various officials of Louisiana and East Carroll Parish,[1] alleging that the apportionment of the police jury (governing body of the parish) and the school board violated the United States Constitution. On May 11, 1971, Stewart Marshall intervened on behalf of himself and all black voters in the parish, arguing that the at-large system approved as a remedy to Zimmer's complaint violated the rights of black residents of the parish, secured by the Fourteenth and Fifteenth Amendments. On behalf of all black residents in the parish, he sought a declaratory judgment and asked for a single-member district plan.

At this early point in the opinion we must refer, briefly, to the litigative background. The district court adopted a parish at-large election plan. A panel of this Court affirmed. *Zimmer v. McKeithen*, 467 F.2d 1381 (1972). The Court en banc reversed and remanded on constitutional grounds. 485 F.2d 1297 (1973). The United States Supreme Court affirmed, but on the alternative ground that the district court abused its discretion in approving multi-member districts absent exceptional circumstances. *East Carroll Parish Sch. Bd. v. Marshall*, 1976, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296. On remand, the district court adopted the defendants' plan in preference to the plaintiff's plan. Each

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1. The named defendants included the Governor of Louisiana, then John McKeithen; the Attorney General; the Secretary of States; the State Custodian of Voting Machines; the Democratic Committee of East Carroll Parish, its chairman and secretary; the Board of Supervisors of Elections of East Carroll Parish, its president and members; the East Carroll Parish Registrar of Voters; the police jury and school board of the parish, all their members and officials. The case has been litigated by the police jury and the school board.

plan provides single-member districts. The districts in each plan appear to be drawn so as to ensure the election of white representatives from certain districts and black representatives from the remaining districts, although defendants' counsel insists that the districts in his plan were not drawn so as to minimize or dilute the voting strength of the blacks in the parish. The court-approved plan of the defendants would probably produce five white representatives and four black representatives; the plaintiff's proposed plan would probably produce five black representatives. Each appears to have been designed consciously to achieve that end, a kind of rough proportioned representation based on registered voting strength. The plaintiff contends that the defendants limited the number of districts in which there was a black majority by drawing jagged lines which gerrymander the districts in the town of Lake Providence, where the blacks are heavily concentrated. The case raises the question, touched on in *Taylor v. McKeithen*, 5 Cir. 1973, 499 F.2d 893, whether a district court may gerrymander apportionment to effect proportional racial representation.

I.

East Carroll Parish is a small, predominately rural parish in the northeast corner of Louisiana. Its 436 square miles are bounded on the east by the Mississippi River and on the north by Arkansas. In 1970 its population was 12,884. Nearly half that number lived in the parish seat, Lake Providence. At that time, about 55 percent of the registered voters in the parish were whites. A special census was taken in 1976 which revealed that about 60 percent of the parish population were blacks.[2] Whites still constituted a slight

2. The census had two purposes. State road fund money is appropriated in part on the basis of population figures. The state relies on its own figures, but allows parishes to challenge those figures with their own census. The other purpose was to provide information for this lawsuit. Tr. at 25-26.

majority of the registered voters, comprising 51.8 percent of the total. The blacks were concentrated in Lake Providence, where 68 percent of the population were blacks.

This suit was originally filed in the wake of the Supreme Court's one-man one-vote decisions. In 1968 there were nine members on the parish police jury and eight on the parish school district. These members were elected from districts composed of the traditional wards. Six of the seven wards elected one representative to each board; the third ward, which included the Town of Lake Providence, elected three police jurors and two school board members.[3] The population per representative in the various districts ranged from under 400 to nearly 4,000. In December 1968 a consent decree was entered which changed the elections to both bodies to an at-large system. The school board was expanded to nine members, and the traditional wards were used to provide residency requirements. One member of each body was to come from each ward except ward three, which would have three members. At-large voting solved the one-man one-vote problem: all votes had the same mathematical weight.

After the 1970 census results became available, the district court directed the parties to submit new plans. Marshall, the black intervenor, challenged the at-large plan on the ground that it unconstitutionally diluted the votes of the parish's large black voting minority. Zimmer, the original plaintiff, withdrew from the case.

3. A third police juror was added to Ward 3 in 1967 under La. Rev. Stat. Ann. § 33:1223. The juror was elected in 1968. Although the apportionment of parish school boards is dependent on the apportionment of the police jury, the school board had not added a member when this case was first tried. Record, Vol. I at 62. The first reapportionment plan approved by the district court provided for a ninth school board member. Record, Vol. I at 109.

The district court held a full trial on Marshall's contentions. It again approved the at-large plan, finding no evidence of racial dilution in the plan, which had been in effect for several years. This Court affirmed. *Zimmer v. Mc Keithen*, 5 Cir. 1972, 467 F.2d 1381. On rehearing en banc the Court disagreed with the panel and reversed the district court. *Zimmer v. McKeithen*, 5 Cir. 1973, 485 F.2d 1297 (en banc) [*Zimmer*]. Judge Gewin wrote, for a closely divided Court, the opinion which has guided this Circuit in later voting dilution cases. *See Nevett v. Sides*, 5 Cir. 1978, 571 F.2d 209, 216-17. The Court held that Marshall had proved that the at-large system unconstitutionally diluted the value of black votes.

The Supreme Court affirmed in a short per curiam opinion. *East Carroll Parish School Board v. Marshall*, 1976, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 [*Marshall*]. The Supreme Court did not reach the constitutional issue considered by this Court. Instead, the Court held that the district court abused its discretion in not ordering single-member districts.[4] A court-ordered plan is held to equitable

4. The Court said: "[The Court of Appeals] seemingly held that multimember districts were unconstitutional, unless their use would afford a minority greater opportunity for political participation, or unless the use of single-member districts would infringe protected rights. . . . [We] now affirm the judgment below, but without approval of the constitutional views expressed by the Court of Appeals. . . . And the Court of Appeals, inexplicably in our view, declined to consider whether the District Court erred under *Connor v. Johnson*, 402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971), in endorsing a multimember plan, resting its decision instead upon constitutional grounds. We have frequently reaffirmed the rule that when United States district courts are put to the task of fashioning reapportionment plans to supplant concededly invalid state legislation, single-member districts are to be preferred absent unusual circumstances . . .. As the en banc opinion of the Court of Appeals amply demonstrates, no special circumstances here dictate the use of multimember districts. Thus, we hold that in shaping remedial relief the District Court abused its discretion in not initially ordering a single-member reapportionment plan." 424 U.S. at 638-39, 96 S.Ct. at 1084-1085. (Citations omitted.)

standards more strict than those governing legislative plans.[5] While legislatures may use multi-member districts, courts may order such a remedy only when special circumstances, absent in East Carroll Parish, are shown.

The Court en banc remanded the case to the district court, this time with instructions to approve a single-member district plan. In April 1976, after an abortive attempt to use a special master,[6] the district court required the parties to submit single-member district plans. The issue was argued in June 1976. Earl K. Selle, an expert the defendants employed, testified on behalf of the local bodies' plan; Stanley Halpin, counsel for Marshall, defended his alternative plan.

Although the Supreme Court did not rule on the merits of our constitutional holding in *Zimmer*, we have since reaffirmed that holding. *See Blacks United for Lasting Leadership v. City of Shreveport*, 5 Cir. 1978, 571 F.2d 248, 251-53.

Four justices expressed the view in *Wise v. Lipscomb*, 1978, ___U.S. ___, 98 S.Ct. 2493, 57 L.Ed.2d 411 that the applicability of voting dilution doctrine to municipal governments was unsettled. ___U.S. at___, 98 S.Ct. 2493. In this circuit it is clear that the dilution doctrine applies to counties; *Zimmer, Kirksey v. Board of Supervisors of Hinds County*, 5 Cir. 1977, 554 F.2d 139 (en banc); and cities, *Lipscomb v. Wise*, 5 Cir. 1977, 551 F.2d 1043; *Nevett v. Sides*, 5 Cir. 1978, 571 F.2d 209,

5. Later, in *Connor v. Finch*, 1977, 431 U.S. 407, 414, 97 S.Ct. 1828, 1833, 52 L.Ed.2d 465, the court expressly stated that in discharging the task of reapportioning a state plan, "a court will be held to stricter standards in accomplishing its task than will a state legislature."

6. In response to a motion by Marshall for compliance with the Supreme Court's mandate, the district court issued guidelines for a special master, then appointed Selle to that position. The court later discovered that Selle had already been employed by the defendant bodies, and revoked his appointment.

Each plan called for nine single-member districts. Because the population of the parish is concentrated in Lake Providence, each plan divided the town into at least five districts. Although the plans draw different lines for the rural districts, the controversy between the parties centered on the districts in Lake Providence. Marshall objected to the many-sided districts carved from the black areas of the town, and the inclusion of a predominately white suburban area in district five. Selle defended the lines as necessary for the plan's "fairness".

The fairness allegedly embodied in the defendants' plan rests on proportional racial representation. Because the black community was 48.2 percent of the total registered voters in 1976, the defendants drew district lines to guarantee the blacks four seats, and give them a good chance to capture a fifth. The expert's testimony makes this manifest.

> "SELLE: The analysis indicated we have 40% white population and 60% black. The analysis of voter registration indicated we have 51.8% white in registration numbers and 48.2% black. Therefore, 60% of the population which is black acquits to the same geological structure of 48.2% of the registration of blacks. 60% black population and 48.2% black registration are conversely 40% of your white population developed to 51.8% in your registration.
>
> In the development of our structure, it appeared to me that we would be able to provide very closely the same representation to the blacks as they have actually in the parish, which politically is 48.2%. 48.2% of a nine member board is 4.336 [4.338], I believe, or 4 1/3 of the seats of a nine member board.

> Our plan does provide for four districts, basically six, seven, eight and nine with black majorities respectively 86%, 99%, 64% and 93%.
>
> These four seats, by rule of thumb and practical application and knowledge, would be considered safe districts for the minority group in this parish.
>
> We have District 3, which has a 51% black majority, and if you utilize the same ration with the 51% of population being of the black structure relates back to 40% voting strength within District 3 and 40% is greater than 33. [sic]
>
> This basically, I think, was our fairness test.
>
> If, in fact it is possible to develop a plan which gives each part of the structure or community its rightful justifiable representation -- if this is a possibility -- then I think it probably should be done."

Transcript, 34-35.

Selle testified that the odd shapes of some of the districts resulted from both population deviation requirements and racial considerations. Tr. 55. He made no great effort to follow precinct lines, tr. 18, but did, generally, attempt to use natural boundaries, tr. 19. His plan had a maximum population deviation of 6.2 percent; the plaintiff's plan had a maximum deviation of 9.7 percent, but provided straighter district boundaries within Lake Providence. The defendants' plan yielded districts with the following racial population compositions:

District 1: 55 percent white, 45 percent black
District 2: 78 percent white, 22 percent black
District 3: 49 percent white, 51 percent black
District 4: 72 percent white, 28 percent black
District 5: 55 percent white, 45 percent black
District 6: 14 percent white, 86 percent black
District 7: 1 percent white, 99 percent black
District 8: 36 percent white, 64 percent black
District 9: 7 percent white, 93 percent black.

Tr. 29-31.

Selle testified that his plan was drawn based on numbers of registered voters. The population of the parish, according to the special 1976 census, was however, 40 percent white and 60 percent black. Although black voters are now a minority, black residents are now a majority. In oral argument, counsel for each party stated that the evidence would support the conclusion that eventually the registration figures would closely coincide with population and produce a majority of registered black voters.

The district court adopted the Selle plan, with slight modifications to District 5. The court also awarded the plaintiffs $21,640 as attorneys' fees, authorized by 42 U.S.C. § 1973 (e). This sum represented $40 an hour for the attorneys' 541 hours of work.

Both sides appealed. Marshall applied from the plan imposed by the court; the government bodies disputed the amount assessed as attorneys' fees.

II.

A. Because of the almost infinite number of patterns apportionment might follow in any given geographical area, the trial judge has a wide range of discretion in adopting a plan. The issue here is whether that discretion was abused. In resolving that issue, it is necessary first to decide what standard to apply to this reapportionment plan. Different limits exist to the equitable powers of a district court, imposing its own plan, and the constitutional authority of a state or duly empowered state body to reapportion itself. In *Marshall*, when this case reached the Supreme Court, the Court based its opinion on equitable considerations without reaching the constitutional questions, citing *Connor v. Johnson*, 1971, 402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed.2d 268.

More recently, the Supreme Court again stressed the significance of that distinction. In *Wise v. Lipscomb*, 1978, __U.S.____ ,98 S.Ct. 2493, 57 L.Ed.2d 411, the Supreme Court reversed a decision by this Court in the Dallas reapportionment case. The Court held that we improperly considered the plan involved a judicial plan, rather than a legislative plan.

Wise, also a challenge to an at-large voting system, was brought by black and Mexican-American residents of Dallas, Texas. Shortly after certifying a plaintiff class of all black citizens of Dallas, the district court gave " 'an opportunity as a legislative body for the City of Dallas to prepare a plan which would be constitutional' ".____U.S. at____, 98 S.Ct. 2496. Three days later, the City Council passed a resolution which stated that the Council intended to enact an ordinance establishing eight districts and three at-large seats. Three

days later, the City submitted that plan to the district court. After extensive hearings, the court approved the plan which was then passed by the Council. This Court reversed, holding that the plan should be judged as a court-ordered plan. Applying the equitable standards to multimember districts enunciated in *Marshall*, we held that the three at-large seats were inappropriate.

The Supreme Court reversed. Justice White announced the decision of the Court in an opinion joined by Justice Stewart. Justice Powell concurred in the judgment in an opinion joined by the Chief Justice and Justices Blackmun and Rehnquist. Justice Marshall dissented, joined by Justices Brennan and Stevens.

Justice White found three important differences between *Wise* and *Marshall*. In *Wise* the district court reviewed the plan as a legislative plan. In *Marshall*, by contrast, the local bodies submitted plans in response to court orders and "did not purport to reapportion themselves . . .." __U.S. at __, 98 S.Ct. at 2495. Second, in *Marshall* federal law prevented the bodies from effectively redistricting. The state law providing police juries and school boards with that power had been disapproved by the Attorney General under §5 of the Voting Rights Act. *Marshall*, 424 U.S. at 638 n. 6, 96 S.Ct. 1083. Finally, in *Wise* the court explicitly gave the Council an opportunity to pass a constitutional apportionment, which it did.

Justice Powell took a different approach. Justice White had relied on the fact that neither the Voting Rights Act nor Texas law prevented the Dallas Council's reapportionment; the concurring Justices felt that was irrelevant. The process,

not the power, controlled.

> "The essential point is that the Dallas City Council exercised a legislative judgment, reflecting the policy choices of the elected representatives of the people, rather than the remedial directive of a federal court. As we held in *Burns [Burns v. Richardson*, 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966)] . . . at 85, 86 S.Ct. 1286, at 1293, 'a State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause.' This rule of deference to local legislative judgments remains in force even if, as in *Burns*, our examination of state law suggests that the local body lacks authority to reapportion itself." ___U.S. at ___, 98 S.Ct. at 2501.

Justice Powell distinguished Marshall on the ground that the Attorney General's disapproval of the empowering statute "tainted" the legislative judgments involved. Hence, they could not be afforded the "normal presumption of legitimacy".

Justice Marshall, in dissent, could not distinguish *Marshall* from *Wise*. In neither case, in his view, had the defendants followed valid state procedures for reapportionment; in neither case did the bodies "purport" to be enacting a binding redistricting.

Although the deeply split Court in *Wise* is difficult to follow with conficence, we believe that the facts of this case are indistinguishable from its earlier incarnation in *Marshall*.[7]

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7. *Marshall* is not the law of the case on this point because it dealt with an earlier submission by these parties. However, to the extent that this submission resembled the one considered in *Marshall, Marshall* is a

Our main reliance is on the colloquy between the district judge and the attorneys in the case. At the hearing the attorneys were concerned with the possible impact of § 5 of the Voting Rights Act on the defendants' submissions.

"MR. BRACKEN (attorney for the defendants): The Police Jury and the School Board did adopt resolutions adopting the plan which we refer to as 9-A as the plan to be submitted to the Court. The original resolution also adopted a plan 9-D as an alternate plan. However, at a subsequent joint meeting, plan 9-D was abandoned.

THE COURT: Do you have a copy of your latest resolution?

MR. HALPIN (attorney for the plaintiffs): I would like to ask Mr. Bracken to file with the Clerk both resolutions. It is our understanding they have adopted the plan pending this Court's approval of it.

MR. BRACKEN: Yes.

MR. HALPIN: We will have serious Section 5 problems because when a plan is adopted by a government body, it must be submitted to the Justice Department.

MR. BRACKEN: *We submit that all they did was move to submit this plan. That is the only thing adopted.*

MR. HALPIN: That is the reason we want to put it in the record as to how it was adopted.

(Footnote 7 continued)
particularly convincing precedent. Our discussion in the text following this deals with the principles by which a court decides whether the plan is court-ordered, and that guides us in concluding that this plan is court-ordered.

MR. BRACKEN: Your Honor, in this particular proceeding after May 14 when we submitted our particular plan, the resolution was authorizing me to submit to the Court plan 9-A. They did, at that point, authorize us to submit plan 9-D as an alternate.

Upon the submission of an opposing plan by Mr. Halpin, he sent me a copy of an order mailed to you for signature, which you did not sign. That plan called for us to submit any other alternate plan. The bodies were called together and asked whether they wanted me to submit this alternate plan. The second resolution was authorizing me not to submit any alternate plan. That is all the resolution says and that's all it does.

THE COURT: When the mandate came down from the Supreme Court to the Fifth Circuit and then to this Court, we entered an order that both bodies should submit a plan to the Court. I don't see where Section 5 cuts any ice in this Court." [Emphasis added]

Tr. at 4-5. As the underscored portion of this passage makes clear, the defense attorney was careful to avoid suggesting that his clients had adopted the plan. Instead, they merely authorized its submission to the Court. The last statement by the district court also seems to indicate that he saw this as a court-ordered plan. Thus, the first and third factors which Justice White found distinguished *Wise* from *Marshall* do not distinguish this case from *Marshall*.

Furthermore, Justice White's second distinguishing factor is also absent from this case. The power of the police jury to reapportion a parish is still ruled by the same Louisiana

statute, La.Rev.Stat. Ann. §§ 33:1221, 1224 (West Supp. 1977). Louisiana is still subject to the pre-clearance provisions of Section 5 of the Voting Rights Act, 42 U.S.C. §1973c. Thus, the power of the police jury to reapportion is limited by the federal pre-clearance requirement and by the fact that the state statute empowering such changes has been held to violate federal law. *Marshall*, 424 U.S. at 638, n. 6, 637 n. 2, 96 S.Ct. 1083. The last factor is also important for Justice Powell's opinion. The factor which he maintained distinguished *Wise* from *Marshall* persists in our case. By the standards set forth in both prevailing opinions, we think that we have before us a court-ordered plan, to be judged first by equitable standards.

[1] B. The central question is this case, apparently one of first impression, is whether equitable standards permit a district court to approve a plan based on racially proportional representation.

The cases distinguishing between the federal bench's equitable powers and the constitutional limits on apportionment have held courts to a stricter standard. For example, legislatures may choose multi-member district plans, absent clear violations of the Constitution. *Whitcomb v. Chavis*, 1971, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363; *White v. Regester*, 1973, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314. The judiciary may impose such plans only in the presence of special circumstances. *Marshall; Connor v. Finch*, 1977, 431 U.S. 407, 415, 97 S.Ct. 1828, 52 L.Ed.2d 465; *Chapman v. Meier*, 1975, 420 U.S. 1,95 S.Ct. 751, 42 L.Ed.2d 766. Similarly, legislative plans embodying up to 10 percent deviations is population between districts have been upheld. *White v. Regesster*, 1973, 412 U.S. 755, 93 S.Ct. 2332, 37

L.Ed.2d 314; *Gaffney v. Cummings*, 1973, 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298. *See also Mahan v. Howell*, 1972, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320. In *Chapman v. Meier*, however, (16 percent deviation justified), the Court refused to assume that a 5.95 percent deviation would satisfy the higher standard required of a court-ordered plan. *See Connor v. Finch*, 431 U.S. at 416-21, 97 S.Ct. 1828, Finally, courts must precisely articulate the interests which justify any deviation from the standards; legislatures need not be candid. *Chapman v. Meier*, 420 U.S. at 26-27, 95 S. Ct. 751.

The Supreme Court has put tight reins on judicial power to reapportion because of the judiciary's uneasy position in these cases. The least representative branch of the government must take care when it reforms the most representative branch. [533]

> "These high standards reflect the unusual position of federal courts as draftsmen of reapportionment plans. We have repeatedly emphasized that 'legislative reapportionment is primarily a matter for legislative consideration and determination.' *Reynolds v. Sims*, 377 U.S. at 586, 84 S.Ct. [1362] at 1394, 2 L.Ed.2d 506, for a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality. The federal courts by contrast possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name. In the wake of a legislature's failure constitutionally to reconcile these conflicting state and federal goals, however, a federal court is left with the unwelcome obli-

gation of performing in the legislature's stead, while lacking the political authoritativeness that the legislature can bring to the task. In such circumstances, the court's task is inevitably an exposed and sensitive one that must be accomplished circumspectly, and in a manner 'free from any taint of arbitrariness or discrimination'. *Roman v. Sincock*, 377 U.S. 695, 710, 84 S.Ct. 1449, 12 L.Ed.2d 620."

Connor v. Finch, 1977, 431 U.S. 407, 414-15, 97 S.Ct. 1828, 1833-1834, 52 L.Ed.2d 465.

[2] The defendants' plan adopted a straightforward approach to fairness in representation: major groups share representation in the proportions that they share voting strength.[8] Although some democracies provide for proportional

8. This assumes, of course, that the proportional representation scheme will be successful. That assumption is dubious. The Selle plan used population figures for each of the nine districts and voter registration figures for the entire parish. The plan assumed that in each district the blacks and whites were registered in the same proportion that they were registered in the entire parish. The plan further assumed that the racial groups would vote only for members of their own race. The finding made earlier in this case that East Carroll Parish has a history of racial bloc voting does not necessarily mean that the blocs would be solid if an exceptionally popular and well qualified candidate of one race ran against an exceptionally unpopular and unqualified candidate of another race. The plan also required that the same proportion of black and white registered voters actually vote in each election. Each of these assumptions is questionable; combined, they render the predictions of the plan speculative. During oral argument we were informed that elections held under this plan had produced not "4 1/3" black police jurors, but 3. Even if the Selle plan had produced the racial balance it aimed at in the first elections, changes over time in any of the relevant factors would ruin its scheme. The growing black population in the parish and the increasing registration of black voters suggest that reapportionment based on 1976 figures will not bring about proportionate racial representation in 1980 or 1984.

representation of parties and ethnic groups; it has never been an American tradition.[9] The Supreme Court has often held that to make a case for unconstitutional districting "it is not enough that the racial group allegedly discriminated against

9. An extreme example was the Lebanese system. From its independence, after World War II, until the breakdown of government during its recent civil war, the Lebanese Constitution provided for a unicameral legislature with six Christian representatives for every five Moslem representatives. After the expansion of the legislature to 99 members in 1960, the chamber had to include 30 Maronite Christians, 20 Sunni Moslems, 19 Shi'ite Moslems, 11 Greek Orthodox, 6 Druzes, 6 Greek Catholics, 4 Armenian Orthodox, and 3 members of other minorities. An unwritten convention provided that the President of the Republic would be a Maronite Christian, the premier a Sunni Moslem, and the Speaker of the Chamber a Shi'ite Moslem. The Cabinet was required to reflect the sectarian balance. 10 Encyclopedia Brittanica 767-68 (1974).

Representation proportionate to a party's voting strength is more common. The upper house of Japan's bicameral legislature elects 100 of its 252 members from a national constituency, in order to provide some proportionate representation for political parties. 10 Encyclopedia Brittanica 52 (1974). Similarly, West Germany's Bundestag is composed of members from districts and members elected at-large from the lander (states). A party must gather at least 5 percent of the vote to be entitled to representation in the Bundestag. 8 Encyclopedia Brittanica 62-63 (1974). In Sweden "each political party receives the same proportion of seats as it receives votes in the general election". 17 Encyclopedia Brittanica 852 (1974).. A party must get either 12 percent of the vote in any one district or 4 percent of the vote throughout the nation to be entitled to any representation. Forty of the 350 members of the Riksdag are allocated directly to the parties in order to achieve the "proper" balance.

Some Anglo-American writers have recognized the advantages of proportional representation. John Stuart Mill wrote:

"In a really equal democracy, every or any section would be represented, not disproportionately, but proportionately. A majority of the electors would always have a majority of the representatives, but a minority of the electors would always have a minority of the representatives. Man for man, they would be as fully represented as the majority. Unless they are, there is not equal government, but a government of inequality and privilege: one part of the people rule

has not had legislative seats in proportion to its voting potential." *White v. Regester*, 1973, 412 U.S. 755, 765-66, 93 S.Ct. 2332, 2339, 37 L.Ed.2d 314. *See Whitcomb v. Chavis*, 1971, 403 U.S. 124, 149, 91 S.Ct. 1858, 29 L.Ed.2d 363; *Zimmer*, 485 F.2d at 1305. On the other hand, although the constitutionality of a completely racially based apportionment might be suspect, it seems clear that a legislature may

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(Footnote 9 continued)

> over the rest: there is a part whose fair and equal share of influence in the representation is withheld from them, contrary to all just government, but, above all, contrary to the principle of democracy, which profess equality as its very root and foundation."

J.S. Mill, Considerations on Representative Government 146 (New York 1862). In this country Thomas Hare proposed a system of proportional representation about the same time. T. Hare, *Election of Representatives* (1865). The Hare system calls for preference voting in multi-member districts. Although it has been tried in some cities and states, it has never been used for congressional elections. Comment, *Political Gerrymandering:* A Statutory Compactness Standard as an Antidote for Judicial Impotence, 41 U.Chi.L.Rev. 398, 402 n. 21 (1974). *See also* C. Hoag & G. Hallett, Jr., *Proper Representation* (2d ed. 1940). Hoag and Hallett support the use of the Hare system, based in large part on the experience of Cincinnati with the plan. Cincinnati, and most of the other jurisdictions in the United States that have tried the system, have since abandoned it. Comment, *Political Gerrymandering*, 41 U. Chi.L.Rev. 398, 401-04.

This issue has been discussed in the racial context in several articles. *See* Halpin and Engstrom, *Racial Gerrymandering* and *Southern State Legislative Redistricting: Attorney General Determinations Under the Voting Rights Act*, 22 Jour.Pub.Law 37 (1973) (approving proportional representation, but conceding that the "Supreme Court has not indicated any inclination to sustain a racial gerrymandering plan". Id. at 41); *Political Gerrymandering*, cited above; Note, *Compensatory Racial Reapportionment*, 25 Stan.L.Rev. 84 (1972) (supporting proportional representation; Note, *Proportional Representation by Race; The Constitutionality of Benign Racial Redistricting*, 74 Mich.L.Rev. 820 (1976) (attacking such plans); and Note, *United Jewish Organizations v. Carey and the Need to Aggregate Voting Rights*, 87 Yale L.J. 571 (1978). *See* also Dixon, The Court, The People, and "One Man, One Vote" in Reapportionment in the 1970's, 7 (N. Polsby ed. 1971); Baker, *Gerrymandering: Privileged Sanctuary or Next Judicial Target?* in Reapportionment in the 1970's, 121 (N. Polsby ed. 1971).

take race into account in districting. *United Jewish Organizations of Williamsburg v. Carey*, 1977, 430 U.S. 144, 97 S. Ct. 996, 51 L.Ed.2d 229. In UJO the Court adopted in the context of race-conscious districting its earlier words about party-conscious districting:

> "[C]ourts have [no] constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State."

430 U.S. at 168, 97 S.Ct. at 1011, quoting *Gaffney v. Cummings*, 1973, 412 U.S. 735, 752, 93 S.Ct. 2321, 37 L.Ed.2d 298.

At this time, we read the decisions of the Supreme Court as admonishing lower federal courts to act cautiously in reapportionments and to leave racially proportional representation to legislative bodies, at least in the absence of some impelling reason to take it into account, for example, where the correction of historic racial discrimination and not merely proper representation is involved.

Our conclusion is reinforced by a consideration of the differences between racially proportionate redistricting and remedial racial goals in other fields. This Court has approved the use of racial goals as remedial devices in employment and education contexts. All other things being equal, it may be assumed that if, for example, 30 percent of a school district's teaching staff is black, about 30 percent of the teach-

ing staff at any given school should be black. Similarly, absent unlawful discrimination, if 30 percent of the available pool of labor in a plant's vicinity is black, it could be expected that 30 percent of the plaintiff's labor force would be black.

Voting is a different matter. The results follow from both the pattern of districts and the voters' preferences. In employment and education, race may not be a factor in making choices. In voting, while we may deplore the use of race as a factor by voters, its use has not been forbidden. Any such ban would itself face serious constitutional problems. The necessary link between the percentage of those eligible and the percentage actually selected that exists in school cases and employment cases is missing in voting cases. Again, our conclusion is that proportional representation is not appropriate in a court-ordered plan.

This Court has not addressed this precise issue in the past. We have recognized that race may be considered as a factor in determining whether a proposed apportionment is acceptable. "In the process of making . . . a determination [about multi-member districts], a court need not be oblivious to the existence and location of minority voting strength." *Zimmer*, 485 F.2d at 1308. *See Kirksey v. Board of Supervisors of Hinds County*, 5 Cir. 1977, 554 F.2d 139, 151 (en banc); *Zimmer*, 485 F.2d at 1304 n.16. But we have also held that "safe" seats for the minority are not required of a reapportionment plan in a dilution case. *United States v. Board of Supervisors of Forrest County*, 5 Cir. 1978, 571 F.2d 951, 955.

In a somewhat similar cituation in *Taylor v. McKeithen*, 5

Cir. 1974, 499 F.2d 893, where the reapportionment of four state senatorial districts in New Orleans was before the Court, we disapproved of a court-ordered plan that was designed to ensure the election of a black senator from each of two districts. We observed, "while the Steimel plan gerrymanders and guarantees the election of a black senator from each of districts 2 and 4, this can be accomplished only by diluting black voting power in districts 3 and 5 to the point where the white senators from those district could ignore with impunity the special needs of blacks in those districts." 499 F.2d at 902. In that case the districts in the plan this Court approved were "compact, contiguous and straight-lined"; taken as a whole,afforded greater access of the minority to the political process than the gerrymandered plan; and the percentage of the black population and registration was rapidly increasing in New Orleans, as it is in East Carroll Parish, leading to the conclusion that some of the districts the trial judge considered "safe" for white candidates were not in fact safe or soon would not be safe. Indeed, one of the weaknesses in racial gerrymandering is that demographic patterns are like shifting sands. *See Taylor*, 499 F.2d at 499.

We think the cases from this Court are consistent with the middle course we chart today. The district judge must be mindful of the impact of the proposed plans on different racial groups. His duty to avoid both gerrymanders and racial dilution requires that much. The judge must analyze the plan and determine that the probable results are such that minority strength is not diluted. But this legitimate concern with the outcome cannot justify a strict proportionality brought about by manipulation of district lines. If the plan passes the dilution test, as explained in *Zimmer*, *Kirksey*, and *Nevett v. Sides*, 5 Cir. 1978, 571 F.2d 209, race is no longer

an important factor. The boundaries should be drawn with an eye to compactness, contiguousness, and the preservation of natural, political, and traditional boundaries; *not* racially balanced representation. We are not legislatures.

[3] The racially balanced representation sought by the district court's plan is a plausible solution, but it has no roots in our past. Moreover, it is based on voter registration, not population. The Supreme Court has recognized that reapportionment based on voter registration rather than population may "perpetuate underrepresentation of groups constitutionally entitled to participate in the political process, or perpetuate a 'ghost of prior malapportionment' ". *Burns v. Richardson*, 1966, 384 U.S. 73, 92-93, 86 S.Ct. 1286, at 1296-1297, 16 L.Ed.2d 376 (footnote and citation omitted). Therefore, reapportionment based on voter registration is allowable only if it produces "a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis". 384 U.S. at 93, 86 S.Ct. at 1297. *See Ely v. Klahr*, 1971, 403 U.S. 108, 115 n.7, 91 S.Ct. 1803, 29 L.Ed.2d 352. The district court's plan, then, is infirm under this standard as well. [10] Finally, we point out that not only was the plan racially conscious, but it attempted in effect to assure that the black population majority would remain a voting minority by protecting the white voting majority from erosion.

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10. Voting age population, rather than voter registration, is an important factor to be considered in assessing the constitutionality of a reapportionment plan. *See United Jewis Organizations v. Carey*, 1977, 430 U.S. 144, 160-62, 97 S.Ct. 996, 51 L.Ed.2d 229; *Beer v. United States*, 1976, 425 U.S. 130, 135, 96 S.Ct. 1357, 47 L.Ed.2d 629; *Kirksey v. Board of Supervisors*, 5 Cir. 1977, 554 F.2d 139, 141, 149-50, *cert. denied*, 434 U.S. 968, 98 S.Ct. 512, 54 L.Ed.2d 454; *Moore v. Le Flore County Board of Election Commissioners*, 5 Cir. 1974, 502 F.2d 621, 626.

The plan was devised explicitly to provide 4/9 black seats, or 44 percent representation compared to 60 percent population. Under *City of Richmond v. United States*, 1957, 422 U.S. 358, 95 S.Ct. 2296, 45 L.Ed.2d 245, a Section 5 case, it is inferrable that the imposition of an apportionment scheme designed purposefully to limit minority representation to a ratio lower than the ratio of black to white population is unconstitutional.

The lower court did not have before it an acceptable alternative for a "court-ordered plan". The plaintiff's proposal contained a maximum population deviation of 9.7 percent which, under *Chapman v. Meier, supra*, would seem to be unacceptably high, and, in any case, has not been justified by any significant state policy. The smaller deviation evident in the defendants' plan suggests also that 9.7 percent is unacceptably high, and, if a lower deviation is possible, a desire for proportional representation would not appear, under *Chapman*, to justify any greater disparity.

We are thus compelled to remand for the formulation of a new plan. This new plan must comply with the traditional standards for "one-man, one-vote" cases, and it must avoid diluting the potential voting strength of the black registration minority, population majority. In this case, the two constitutional duties, assuring each voter the right to an equal vote and avoiding racial discrimination, mesh because the "minority race" actually constitutes the majority of potential voters; the very thrust of "one-man, one-vote" is the prevention of *majority* dilution through apportionment techniques.

C. We recognize that the district court may have difficulty applying our conclusions to the facts of this case. There is no dispute that the plan adopted by the district court was drawn for the express purpose of providing representation in proportion to each race's share of the registered vote. The plan offered by the plaintiff, which did not adhere to a strict racial quota, had a roughly equivalent population deviation and considerably more rational boundary lines within the town. The inclusion of the white area north of the lake in district five and the strange boundaries for districts eight and nine resulted from following this scheme.[11] On remand the district court should give more weight to the neutral values of rational boundaries, and to districts of equal voting population, and less weight to the political objective of proportional racial representation.

III.

[4] The district court awarded Marshal $21,640 as attorneys' fees. The police jury and school board appeal. The defendants do not challenge the applicability of the attorneys' fee statute, 42 U.S.C. § 1973l(e), nor the propriety

11. Because we have concluded that this plan was adopted to reach an improper goal, we have not had to consider Marshall's contention that the plan minimized black voting strength. Marshall's argument is plausible, particularly in light of the extremely high concentration of black voters in districts seven and nine. The most heavily white district, district two, is 78 percent white; the two most heavily black districts are 99 and 93 percent black. The third most heavily concentrated black district, district six, is 86 percent black. While concentrating a race's population in a few districts makes those districts' seats "safer", it also reduces the influence of the group in the remainder of the parish. These concentration figures may be explained by residential patterns in Lake Providence. As we discussed above, the district court on remand should look carefully at the effects of the plans offered to make sure that they are not gerrymanders, minimizing either group's political power.

of an award in this case. Instead, they urge that the award was excessive. They rely on the fact that counsel for Marshall has handled many reapportionment cases and thus was familiar with the legal issues involved. This case has been before our Court three times, once en banc. Marshall and his attorney carried it to the Supreme Court. It has occupied the district court for several years. Regardless of the experience of the counsel, this litigation cannot be termed "routine". Under the standards set out in *Johnson v. Georgia Highway Express Co.*, 5 Cir. 1974, 488 F.2d 714, the district court was well within in its discretion in making this award.

IV.

This case well illustrated this Court's conclusion in *Kirksey:*

> "Achieving one-man, one-vote political democracy without excluding minorities from political life is a complex task that challenges the best of intellects and requires examining many facets of the community, past, present and future. The problem is not susceptible of simplistic solutions, however seductive they may appear. No mechanistic solution is an alchemistic philosopher's stone that will turn all the problems of the past and present to future gold."

554 F.2d at 152. Proportional racial representation, though attractive, is an abuse of the district court's equitable discretion. The district court decision is REVERSED and REMANDED.

APPENDIX B

Judgment of United States Court of Appeals
for the Fifth Circuit

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 19

No. 76 - 3114

D. C. DOCKET NO. CA-13, 927

STEWART MARSHALL,

Plaintiff-Intervenor-Appellant-
Appellee,

versus

EDWIN W. EDWARDS, ET AL.,

Defendants-Appellees,

EAST CARROLL PARISH POLICE JURY and
EAST CARROLL PARISH SCHOOL BOARD.

Defendants-Appellees-Appellants.

Appeals from the United States District Court for the
Western District of Louisiana

Before WISDOM, GOLDBERG and RUBIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the orders of the District Court appealed from, in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

October 25, 1978

Issued As Mandate:

APPENDIX C

Judgment and Order of U.S. District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

FILED: June 3, 1976

STEWART MARSHALL,
Plaintiff-Intervenor

versus CIVIL ACTION NO. 13,927

JOHN J. McKEITHEN, ET AL,
Defendants

JUDGMENT AND ORDER

This matter came on for hearing on June 3, 1976, and, after considering the evidence, it is hereby

ORDERED that the East Carroll Parish Police Jury and School Board hereby are apportioned into nine single-member districts according to the plan submitted by defendants, as amended, as shown on the map hereto attached.

FURTHER ORDERED that elections for all members of the East Carroll Parish Police Jury and School Board shall be conducted under the plan ordered herein on the dates scheduled for Congressional elections commencing with the first primary on August 14, 1976, and those persons elected shall

be issued their commissions and take office as soon as feasible after said elections are final.

FURTHER ORDERED that the present members of the East Carroll Parish Police Jury, who are scheduled to vacate office on June 7, 1976, shall remain in office until members elected under the plan approved herein take office.

All other election officials of the Parish and State shall take whatever action necessary to effectuate this order, including opening qualifications, certifying candidates, and issuing commissions.

IT IS FURTHER ORDERED that members of the School Board shall be elected for staggered terms of two, four, and six years as follows:

DISTRICT	TERMS
1	2 years
2	2 years
3	4 years
4	4 years
5	6 years
6	6 years
7	2 years
8	6 years
9	4 years

and thereafter shall be elected for six year terms at times scheduled for School Board elections in accordance with State law.

FURTHER ORDERED that a verbal description of said plan be drafted by defendants, served upon plaintiff's counsel, and published in a newspaper of general circulation in the Parish, together with a copy of this order and attachments for three consecutive weekly issues commencing as soon as possible.

AND IT IS FURTHER ORDERED that defendants are bound *in solido* and shall pay attorney's fees to plaintiff's counsel pursuant to 42 U.S.C. § 1973(1), in the amount of $21,640.00. As between defendant bodies, each shall pay one half of said fee.

THUS DONE AND SIGNED, at Shreveport, Louisiana, this 3rd day of June, 1976.

S/ Ben C. Dawkins, Jr.
BEN C. DAWKINS, JR.
SENIOR UNITED STATES
DISTRICT JUDGE

ATTEST: A TRUE COPY
DATE: Jan. 19, 1979
ROBERT H. SHEMWELL, CLERK
BY: S/ Bernice Greer
Deputy Clerk, U.S. District Court
Western District of Louisiana

APPROVED AS TO FORM:

S/ Stanley A. Halpin, Jr.
Counsel for Plaintiff

S/ Charles R. Brackin
Counsel for Defendants

APPENDIX D

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

December 21, 1978

EDWARD W. WADSWORTH
Clerk

Tel. 504-5689-6514
600 Camp Street
New Orleans, La. 70130

TO ALL PARTIES LISTED BELOW:

NO. 76-3114 - STEWARD MARSHALL v.
EDWIN W. EDWARDS, ET AL, EAST
CARROLL PARISH POLICE JURY and
EAST CARROLL PARISH SCHOOL BOARD

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By: S/ Sally Hayward
Deputy Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1263

EAST CARROLL PARISH POLICE JURY, et al.,
Petitioners,

versus

STEWART MARSHALL,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STANLEY A. HALPIN, JR.
806 Perdido Street, Suite 401
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Attorney for Respondent

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78 - 1263

EAST CARROLL PARISH POLICE JURY, et al.,
Petitioners,

versus

STEWART MARSHALL,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent prays that this Court deny the Petition for Writ of Certiorari sought by Petitioners to review the decision of the United States Court of Appeals for the Fifth Circuit, rendered on October 5, 1978.

QUESTIONS PRESENTED

1. Whether this case is moot due to the subsequent actions of the District Court.

2. Whether the Court of Appeals clearly erred in finding that the District Court's plan was remedially inappropriate in

that it employed a simplistic and mechanistic "fairness standard" which artificially minimize the voting strength of black citizens by the use of contorted lines.

STATEMENT OF THE CASE

In earlier rounds of litigation in this case the Court of Appeals, *en banc*, held that at large-elections in East Carroll Parish violated the constitution. *Zimmer v. McKeithen*, 485 F.2d 1297 (1973), this Court affirmed on alternative non-constitutional grounds that single membered districts were to be preferred absent exceptions circumstances. *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976), on remand the District Court selected as a remedy a plan drawn by E. Kenneth Selle and supported by the Defendants. Selle justified the contorted lines of his plan as necessary to meet his crude "fairness standard" which called for four black majority districts and five white majority districts. The United States Court of Appeals in its October 25, 1978, judgment which Petitioners would have this Court review, reversed the District Court and remanded the case for application of a remedy which avoided dilution of black voting strength and which was not based upon the mechanistic "fairness standard". The Defendants sought stays which were denied by the Court of Appeals and by this Court. Accordingly, the District Court called for a submission of proposed re-districting plans from the parties and further appointed Kenneth Selle as Special Master to again devised a plan for the Court. The District Court conducted a hearing on March 1, 1979, and by order of the same day directed the implementation of a nine single member district court devised plan. Elections under that plan are scheduled for the regular time set by state law for conducting police jury elections. Those elections will be commenced in 1979 on

August 6th with the opening of qualifications.

Also, since the filing of the petition for Writ of Certiorari herein, the parties have compromised and settled for a slightly reduced amount the attorneys fee claimed for which Petitioners had originally sought review. The attorneys fee issue is now moot by virtue of this settlement.

REASONS FOR DENYING THE WRIT

I. *The Case is now Moot by Virtue of Subsequent Action in the District Court.*

After the Fifth Circuit and this Court denied stays in the instant case a hearing was conducted in the District Court on March 1, 1979. At the close of that hearing the District Court substituted a nine single member district plan based upon population as its remedy in the instant case. Elections are to be conducted under that plan at the regularly scheduled time for conducting police jury elections, which will commence with the opening of qualifications for office on August 6, 1979. Since the District Court has now changed its remedy there would be no practical consequences of this Court reviewing the original remedy of the District Court. Also, as indicated above the parties have settled and compromised the attorney fee claim for an amount slightly less then that claimed and this issue is moot by virtue of that settlement. Thus, the issues of this case are both stale and moot and for these reasons alone the Writ should be denied.

II. *The Case does not Present Issues of a Magnitude Worthy of Review by Certiorari.*

If not stale and moot this case still would not present

issues of a magnitude worthy of this Court's grant of a Writ of Certiorari. The case does not present an issue of constitutional magnitude but rather, at most, presents only issues of remedial appropriateness which are controlled by the peculiar facts of this case. The plan which emerged from the first round of litigation in the District Court was found by this Court in the *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976), to be a court ordered plan wherein the standards of remedial appropriateness applied. The plan which emerged from the second round in the District Court (which generated the present petition) was even more clearly a court ordered plan. The Court of Appeals carefully applying *Wise v. Lipscomb*, 98 S.Ct. 2493 (1978), so held. The facts of this case are particularly clear because at the opening of the hearing in the District Court counsel for Plaintiffs, concerned with the possible applicability of Section 5, generated a colloquy with the Court and the District Attorney which resulted in a clear understanding that the governmental bodies has not adopted any plans but rather had only suggested to the Court plans appropriate as a remedy. If this were not the case clearly Section 5 of the Voting Rights Act of 1965 would apply and the plan disallowed by the Fifth Circuit would be disallowed for failure to obtain Section 5 clearance. Such a determination however, would place a cloud over the forthcoming election and add further confusion to the election process in East Carroll Parish which had long been complicated by this litigation.

Once it found that the standards of remedial appropriateness applied, the District Court turned its decision on the peculiar facts of this case.

The Court of Appeals also based its decision upon the independent alternative ground that the plan was based upon

voter registration rather than upon population. Thus, the plan violated a rule which by this time has become elementary in re-districting. In 1962, not a single black was registered to vote in East Carroll Parish. The registration rates of blacks still fall substantially below that of whites so that while the population of the parish is majority black its voter registration remains majority white. Basing the plan upon voter registration clearly tends to entrench the existing white majority and would be a continuation of past discrimination if allowed.

CONCLUSION

Because the issues for which Petitioners seek review herein are both stale and moot, and because the case below turned on non-constitutional issues of meager significance and since the Court of Appeals provided an alternative ground for its decision which is well settled in the law, Respondents urge that this Court deny the Petition for Writ of Certiorari herein.

Respectfully submitted,

STANLEY A. HALPIN, JR.
Attorney for Respondent

CERTIFICATE

I, Stanley A. Halpin, Jr., Attorney for Respondent and a member of the Bar of the United States Supreme Court, do hereby certify that on this 4th day of May, 1979, I served copies of the foregoing Response to Petition for Writ of Certiorari upon the attorney of record for Petitioners herein, Mr. George F. Fox, Jr., by mailing three copies of same, postage prepaid to him at his office at 301 Morgan Street, Lake Providence, Louisiana 71254.

STANLEY A. HALPIN, JR.
Counsel for Respondent